Atlas Housing Sdn Bhd v Dream Property Sdn Bhd

HIGH COURT (JOHOR BAHRU) — CIVIL SUIT NO 22–642 OF 2006
GHAZALI CHA JC
10 OCTOBER 2006

Civil Procedure — Affidavit — Admissibility of affidavits filed — Whether contents of affidavit sufficient for determination under O 14A application

Civil Procedure — Disposal of action without trial — Stage at which O 14A applicable — Whether O 14A applicable — Whether O 14A is a two stage proceeding — Whether case suitable for determination of the question of construction of an Agreement under O 14A

Contract — Construction of terms of contract — Sale and purchase agreement — Determination of date of delivery of vacant possession — Whether defendant in breach of the sale and purchase agreement

The plaintiff's claim in this case was based upon a Sale & Purchase Agreement made between the plaintiff and the defendant on 19 November 2004 ('the said Agreement'). According to the said agreement, the plaintiff agreed to sell and the defendant agreed to buy the plaintiff's land, which had an area of about 5.8274 hectares (or 14.4 acres) and known as Grant No 101840 Lot 325 Mukim Simpang Kanan in Batu Pahat ('the plaintiff's land'). The defendant had occupied the plaintiff's land but disputed the date when payment of the balance 90% of the purchase price was due to the plaintiff. This dispute arose because this date was to be calculated from the date of delivery of vacant possession of the plaintiff's land to the defendant. The plaintiff had filed an O 14A application and the grounds given by the plaintiff for proceeding by way of an O 14A application was that a determination of the construction of the Special Conditions in the said Agreement had finally determined the date of delivery of vacant possession of the plaintiff's land to the defendant as well as the date when payment of the 90% purchase price was due under the said Agreement. Learned Counsel for the defendant raised several points to object to the plaintiff's application which were inter alia, as follows; (a) that the plaintiff sought determination of facts and not questions of law or construction of documents arising from the matter; (b) that pleadings were not closed at the time the plaintiff's application was filed, (c) that O 14A was a two-stage proceeding and that the plaintiff should have first applied to ask the Court to determine if the question of construction was suitable for determination without trial, (d) that the plaintiff did not state the questions clearly, (e) that the plaintiff's two affidavits affirmed by Dato' Tan Eng Boon and Tang Pei Hau respectively were hearsay evidence and must be disregarded, (f) that there were disputes of facts that could only be resolved by calling witnesses.

Held, allowing the plaintiff's O 14A application:

(1) If the rules intended to make O 14A applicable only after pleadings are closed, then the rules would have mentioned the stage of proceedings when O 14A was to become applicable, instead of just saying 'at any stage of the proceedings' (see para 6). Under O 14A, there was no requirement to apply for leave first before a party may file an O 14A application (see para 7).

(2) Tang Pei Hau had personal knowledge of the contents of his affidavit. He was the photographer of the photographs that was exhibited in his affidavit. His evidence was definitely admissible in court. As for Dato' Tan Eng Boon's affidavit dated 11 September 2006, it contained facts within his personal knowledge. Unlike Tang Pei Hau, Dato' Tan was not there when the school was moved but he exhibited in his said affidavit a Statutory Declaration affirmed by a gentleman (Mr Lee Sea Boon) who organised the moving of the school (see para 11).

(3) A Statutory Declaration is a declaration that the maker makes under oath to be true. If the maker makes a false statement in his statutory declaration, he was liable to be prosecuted for giving false evidence, much the same as if the deponent of an affidavit makes any false statement in his affidavit. In s 3 of the Interpretation Act 1967, 'affidavit' is defined to 'include statutory declaration'. Thus, Dato' Tan Eng Boon's affidavit was also definitely admissible in court (see para 11).

(4) An affidavit contains statements made under oath, believed by the deponent to be true and accurate. A witness should not be giving different versions of facts under oath to suit his needs. He must not be allowed to brush off his false statement in another case concerning the same subject matter by saying it was not relevant (see para 15).

(5) It will cause unnecessary delay and a waste of time if the headmaster and school teachers of the school had to be called as witnesses to confirm what was already clear from contemporaneous documents and photographs. Most important was that the material facts were not in dispute for the purpose of construing the question of construction of the Special Conditions in the said Agreement (see para 17).

(6) The contents and application of O 14A in England was different from that used in Malaysia. In England, both parties must consent to the use of O 14A but under our O 14A r 3, the caveat placed upon the court is merely to give the parties the opportunity of being heard on the question (see para 18).

(7) This was a suitable case for determination of the question of construction of the said Agreement by using O 14A. There were Special Conditions in the said Agreement and according to cl 23, the Special Conditions shall prevail over the terms and conditions contained in cl 1 to 22 (see para 20) *(Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 referred).

(8) The date of delivery of vacant possession was the date when a joint inspection was carried out and the defendant/purchaser's representative confirmed that the school had been relocated. The school had been relocated before the date of joint inspection, which took place on 21 November 2005. After the joint

inspection was carried out as required under special condition No 3, the defendant/purchaser's representative confirmed having jointly inspected the site and also that the school administration had been 'relocated', using the same word that was used in Special Condition No 1. Together with the undisputed facts, the conclusion must be that delivery of vacant possession happened on 21 November 2005 (see paras 23, 24).

(9) Since the defendant admitted that no payment was made on or before 21 May 2006, cl 12 providing for forfeiture of the ten percent deposit was applicable. The defendant should have returned vacant possession of the plaintiff's land by 22 May 2006. They failed to do so and instead have wrongfully continued to make use of the plaintiff's land. The defendant must therefore pay the plaintiff damages for the loss and damage suffered by the plaintiff (see para 26).

(10) The late payment of RM5.15m should be refunded by the plaintiff after the defendant restored the plaintiff's land and returned vacant possession to the plaintiff. Meanwhile, it was fair for the plaintiff to withhold the money as security for damages (see para 27).

[Bahasa Malaysia summary

Tuntutan plaintif dalam kes ini berdasarkan kepada Perjanjian Jual Beli yang dibuat antara plaintif dan defendan pada 19 November 2004 ('perjanjian tersebut'). Mengikut perjanjian tersebut, plaintif telah bersetuju untuk menjual dan defendan telah bersetuju untuk membeli tanah plaintif, dengan keluasan kira-kira 5.8274 hektar (atau 14.4 ekar) dan dikenali sebagai Geran No 101840 Lot 325 Mukim Simpang Kanan di Batu Pahat ('tanah plaintif'). Defendan telah menduduki tanah plaintif tetapi mempertikaikan tarikh baki bayaran 90% harga belian yang sepatutnya diberikan kepada plaintif. Pertikaian ini timbul kerana tarikh ini adalah dikira dari tarikh penyerahan milikan kosong tanah plaintif kepada defendan. Plaintif telah memfailkan permohonan untuk A14A dan alasan yang diberikan oleh plaintif bagi prosiding permohonan A14A adalah untuk menentukan pentafsiran Syarat Khas dalam perjanjian tersebut yang akan menentukan tarikh penyerahan milikan kosong tanah plaintif kepada defendan dan juga bila tarikh bayaran 90% harga belian menjadi tertunggak dalam perjanjian tersebut. Peguam yang bijaksana bagi pihak defendan membangkitkan beberapa perkara bagi menentang permohonan plaintif, antara lain, seperti berikut, (a) plaintif memohon penentuan fakta dan bukan persoalan perundangan atau pentafsiran dokumen yang berpunca dari perkara tersebut; (b) tempoh pliding-pliding belum ditutup semasa plaintif memfailkan permohonan; (c) A14A adalah prosiding dua-peringkat dan plaintif sepatutnya memohon kepada Mahkamah untuk menentukan jika soal pentafsiran adalah sesuai ditentukan tanpa perbicaraan, (d) persoalan-persoalan tidak dinyatakan dengan jelas oleh plaintif, (e) dua afidavit plaintif yang masing-masing disahkan oleh Dato' Tan Eng Boon dan Tang Pei Hau adalah dengar cakap dan hendaklah diabaikan, (f) terdapat pertikaian-pertikaian fakta yang hanya boleh diselesaikan dengan memanggil saksi-saksi.

Diputuskan, membenarkan permohonan perintah 14A:

(1) Jika kaedah-kaedah bermaksud bagi tujuan memohon A14A hanya terpakai setelah pliding-pliding ditutup, sudah tentu kaedah-kaedah akan menyebut pada peringkat prosiding manakah A14A dapat digunakan, dan bukannya mengatakan 'pada mana-mana peringkat prosiding' (lihat perenggan 6). Di bawah A 14A, tidak terdapat keperluan untuk memohon kebenaran terlebih dahulu sebelum sesuatu pihak memfailkan permohonan A 14A (lihat perenggan 7)

(2) Tang Peng Hau mempunyai pengetahuan peribadi terhadap kandungan-kandungan afidavit. Dia adalah seorang jurugambar kepada gambar-gambar yang dieksibitkan dalam afidavit. Keterangannya adalah jelas boleh diterima dalam mahkamah. Berkenaan afidavit Dato' Tang Eng Boon bertarikh 11 September 2006, ia mengandungi fakta-fakta di dalam pengetahuan peribadinya. Tidak seperti Tang Peng Hau, Dato' Tan tiada di situ semasa sekolah itu dipindahkan tetapi dia mengeksibitkan dalam afidavitnya Akuan Berkanun disahkan oleh seorang lelaki (Mr Lee Sea Boon) yang mengatur perpindahan sekolah tersebut (lihat perenggan 11).

(3) Akuan Berkanun adalah akuan pelaku yang dibuat secara bersumpah. Jika pelakunya membuat pernyataan tidak benar dalam akuan berkanun, dia akan didakwa kerana memberi keterangan palsu, sama seperti saksi sumpah dalam afidavit yang memberikan sebarang pernyataan palsu dalam afidavitnya. Dalam s 3 Akta Tafsiran 1967, afidavit didefinisikan 'termasuklah akuan berkanun'. Oleh itu, afidavit Dato' Tan Eng Boon jelas boleh diterima di mahkamah. (lihat perenggan 11).

(4) Sesuatu afidavit mengandungi pernyataan-pernyataan bersumpah, saksi sumpah mempercayainya adalah benar dan tepat. Seorang saksi tidak boleh memberi versi fakta yang berlainan di bawah sumpah bagi disesuaikan dengan kehendaknya. Dia tidak dibenarkan untuk menolak pernyataan palsu dalam kes lain berkaitan perkara sama dengan mengatakan ianya tidak relevan. (lihat perenggan 15)

(5) Ini akan menyebabkan kelewatan yang tidak diingini dan pembuangan masa jika guru besar dan guru-guru sekolah di sekolah berkenaan perlu dipanggil sebagai saksi-saksi untuk mengesahkan apa yang sudah jelas dari dokumen-dokumen dan gambar-gambar yang ada. Yang pentingnya, fakta material tidak dipertikaikan bagi tujuan mentafsirkan persoalan pentafsiran Syarat Khas dalam perjanjian tersebut (lihat perenggan 17).

(6) Kandungan-kandungan dan permohonan A14A di England adalah berbeza dengan yang digunakan di Malaysia. Di England, kedua-dua pihak mesti bersetuju kepada penggunaan A14A tetapi di bawah A14A k 3, caveat yang diletakkan ke atas mahkamah hanya memberikan pihak-pihak peluang untuk didengar bagi setiap persoalan (lihat perenggan 18).

(7) Ini adalah kes yang sesuai untuk menentukan persoalan mengenai pentafsiran perjanjian tersebut dengan menggunkan A14A. Terdapat Syarat-syarat Khas dalam perjanjian tersebut dan mengikut kl 23, Syarat-syarat Khas akan

mengatasi terma-terma dan syarat-syarat yang terkandung dalam kl 1 sehingga 22 (lihat perenggan 20)) (*Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8 dirujuk).

(8) Tarikh penyerahan milikan kosong adalah tarikh apabila pemeriksaan bersama dijalankan dan defendan/wakil pembeli mengesahkan bahawa sekolah perlu ditempatkan semula. Sekolah telah ditempatkan semula sebelum tarikh pemeriksaan bersama, yang berlaku pada 21 November 2005. Selepas pemeriksaan bersama dijalankan sebagaimana dikehendaki di bawah syarat khas No. 3, defendan/wakil pembeli mengesahkan bahawa telah bersama-sama memeriksa tapak itu dan juga pihak pentadbiran sekolah telah ditempatkan semula, menggunakan ayat sama yang digunakan dalam Syarat Khas No. 1. Bersama-sama fakta-fakta yang tidak dipertikaikan, kesimpulannya adalah penyerahan milikan kosong berlaku pada 21 November 2005 (lihat perenggan 23, 24).

(9) Memandangkan defendan mengakui bahawa tiada bayaran pada atau sebelum 21 Mei 2006, kl 12 memperuntukkan untuk perampasan sepuluh peratus deposit boleh digunakan. Defendan seharusnya mengembalikan milikan kosong tanah plaintif pada 22 Mei 2006. Mereka gagal berbuat demikian dan sebaliknya secara salah meneruskan penggunaan tanah plaintif. Oleh itu, defendan hendaklah membayar ganti rugi kepada plaintif untuk kehilangan dan kerugian yang ditanggung oleh plaintif (lihat perenggan 26).

(10) Bayaran lewat sebanyak RM5.15 juta hendaklah dikembalikan oleh plaintif selepas defendan memulihkan semula tanah plaintif dan menyerahkan semula milikan kosong kepada plaintif. Sementara itu, adalah adil untuk plaintif menahan wang tersebut sebagai jaminan ganti rugi (lihat perenggan 27).]

Notes

For the case on disposal of point of law, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) para 2252.

For cases on construction of terms of contract, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2797–2799.

Cases referred to

Bank Negara Malaysia v Mohd Ismail [1992] 1 MJL 400 (refd)

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu [2004] 1 MLJ 8 (refd)

Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd [1993] 3 MLJ 16 (refd)

Tractors Malaysia Bhd v Tio Chee Hing [1975] 2 MLJ 1 (refd)

Legislation referred to

Interpretation Acts 1967 s 3

Rules of the High Court 1980 O 14 r 1, O 14A, O 14A rr 1(2), 1(3), 2, O 16 rr 1, 1(2), O 53 r 2(1)

T Gan (Gan & Lim) for the plaintiff.

CH Mong (Shearn Delamore & Co) for the defendant.

Ghazali Cha JC:

GROUNDS OF JUDGMENT

[1] The plaintiff's claim in this case is based upon a Sale & Purchase Agreement made between the plaintiff and the defendant on 19 November 2004 ('the said Agreement'). According to the said Agreement, the plaintiff agreed to sell and the defendant agreed to buy the plaintiff's land which has an area of about 5.8274 hectares (or 14.4 acres) and known as Grant No 101840 Lot 325 Mukim Simpang Kanan in Batu Pahat ('the plaintiff's land').

[2] The defendant is occupying the plaintiff's land but disputing the date when payment of the balance 90% of the purchase price was due to the plaintiff. This dispute arose because this date was to be calculated from the date of delivery of vacant possession of the plaintiff's land to the defendant. The plaintiff had filed an O 14A application with a Certificate of Urgency to seek an early hearing for the said application. The ground given by the plaintiff for using O 14A was that a determination of the construction of the Special Conditions in the said Agreement will finally determine the date of delivery of vacant possession of the plaintiff's land to the defendant as well as the date when payment of the 90% purchase price was due under the said Agreement.

[3] Order 14A is a relatively new provision in our Rules of the High Court 1980. It reads as follows:

(1) 1.(1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the Court that:

(a) such question is suitable for determination without the full trial of the action; and

(b) such determination will finally determine the entire cause or matter or any claim or issue therein;

(2) Upon such determination, the Court may dismiss the cause or matter or make such order or judgment as it thinks just.

(3) The Court shall not determine any question under this Order unless the parties have had an opportunity of being heard on the question.

(4) The jurisdiction of the Court under this Order may be exercised by a Registrar.

(5) Nothing in this Order shall limit the powers of the Court under O 18 r 19, or any other provision of these rules.

2. An application under rule 1 may be made by summons or motion or may be made orally in the course of any interlocutory application to the Court.

[4] I found that the contents and exhibits in the affidavits filed by both sides show that the material facts are not in dispute. The material facts in this case are as follows:

(a) The terms and conditions for the sale and purchase of the plaintiff's land are all contained in the Sale & Purchase Agreement dated 19 November 2004.

(b) There were 40 squatters and a school known as Sekolah Rendah Hwa Nan ('the School') located on the plaintiff's land at the time of their Agreement on 19 November 2004.

(c) The School only occupied about 0.75 acre which was about five percent (5%) of the total land area of the Plaintiff's land which is 14.4 acres.

(d) There were four gates, located at four different parts of the fencing, around the School.

(e) On 16 November 2005 the plaintiff's conveyancing solicitors Messrs Gan & Tey wrote to the defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong to propose a joint inspection of the plaintiff's land to be held on 18 November 2005 to handover vacant possession to the defendant.

(f) Messrs Ajmer Sandhu & Ong replied on 17 November 2005 on behalf of the defendant and fixed the date of 21 November 2005 and time of 2.30pm for a joint inspection of the plaintiff's land.

(g) On 21 November 2005 the plaintiff's representatives and the defendant's representative did meet at the plaintiff's land and they carried out the joint inspection.

(h) After the joint inspection was carried out on 21 November 2005 while they were still at the School, the defendant's representative Mr Yiap Toon Cheng wrote, by hand, these words: 'I have jointly inspected the school site with Mr Edwin Tan & Mr Tang and confirm that the school administration has been relocated.' Below these words were a signature and handwritten name 'YIAP TOON CHENG' and the number '5928278'. This letter was handed to the plaintiff's representatives, and reads as follows:

(i) The plaintiff's conveyancing solicitors Messrs Gan & Tey wrote the next day, on 22 November 2005 to the defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong to confirm the delivery of vacant possession as having taken place on 21 November 2005 and that the last day for the defendant to pay the balance purchase price should be 21 March 2006 with an extension of two (2) months subject to payment of interest for late payment at 7% per annum.

(j) The defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong replied to the plaintiff's conveyancing solicitors Messrs Gan & Tey but they did not dispute that delivery of vacant possession took place on 21 November 2005 and that the last day for the defendant to pay the balance purchase price should be 21 March 2006.

(k) The plaintiff's conveyancing solicitors Messrs Gan & Tey wrote again to the defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong on 21 December 2005 and in their letter they repeated that the last day for the defendant to pay balance purchase price should be 21 March 2006.

(l) The defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong replied on 9 January 2006 to the plaintiff's conveyancing solicitors Messrs Gan & Tey, and again they did not dispute that delivery of vacant possession took place on 21 November 2005 and that the last day for the defendant to pay the balance purchase price should be 21 March 2006.

(m) There was no letter at all written by the defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong between 22 November 2005 and 7 March 2006 to dispute that vacant possession had been delivered on 21 November 2005.

(n) The first time the defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong wrote to complain was in their letter dated 8 March 2006. They alleged that the defendant had all this while been prevented by the school authority from entering the premises and that vacant possession was delivered to the defendant on 28 February 2006.

[5] Learned Counsel for the defendant raised several points to object to the plaintiff's application. The defendant's first point was that the plaintiff was seeking determination of fact and not question of law or construction of documents arising from the matter. This submission is wrong because it is clear that the question raised by the plaintiff was a question of construction of the said Agreement. The plaintiff even specified Clause 12 and Special Conditions No 1 and No 3 of the said Agreement as the main subject of the question of construction. The answer to the question would then be applied to those undisputed facts of the case mentioned above. This is clearly the intention of O 14A r 1(2), which said that upon determining the question of construction, 'the Court may dismiss the cause or matter or make such order or judgment as it thinks just.'

[6] The second point raised by the defendant was that pleadings were not closed at the time the plaintiff's application was filed. This objection was wrong because O 14A uses the words 'at any stage of the proceedings'. I agree with the learned Counsel for the plaintiff that if the Rules intended to make O 14A applicable only after pleadings are closed, then the Rules would have mentioned the stage of proceedings when O 14A is to become applicable, instead of just saying 'at any stage of the proceedings'. This point becomes clear when it is noted that other rules in the Rules of the High Court 1980 actually specify the stage of proceedings when a particular rule becomes applicable. For example, O 14 r 1 says that an O 14 application may be filed only after the entry of appearance stage. Another example is O 16 r 1 that says a defendant may apply to issue a Third Party Notice only after he has entered appearance, and not as soon as he is served with a writ of summons. The defendant had filed two lengthy affidavits to state their position about the dispute with the plaintiff and they must take the same position in their statement of defence.

[7] The third point submitted by the defendant was that O 14A is a two-stage proceeding, and that the plaintiff should have applied first to ask the Court to determine if the question of construction is suitable for determination without trial. I find this submission to be wrong too because under O 14A there is no requirement to apply for leave first before a party may file an O 14A application. This is clear

when compared with O 16 r 1(2) and also O 53 r 2(1) where an application for leave must be filed, and leave be granted first before the applicant may file the substantive application. Further, and more important, it must also be noted that O 14A r 2 says:

> An application under rule 1 may be made by summons or motion or may be made orally in the course of any interlocutory application to the Court. (Emphasis added).

[8] Since r 2 expressly says that even while the Court is in the middle of considering other interlocutory applications, an application under Rule 1 may be made orally for the Court to determine any question of construction of law or any document arising from the matter, this must surely mean that an O 14A application is not to be intended to be a two-stage proceedings. Otherwise how can the rules expressly allow an O 14A application to be made orally? We must not read into the rules what is not there. I find the defendant's submission on their third point to be wrong too.

[9] The fourth objection raised by the defendant was that the plaintiff did not state the questions clearly. From the summons-in-chambers filed by the plaintiff, it was clear that there is only one question of construction of document arising from the matter. Based on the undisputed material facts, the question was: 'upon construing the said Agreement, in particular Special Conditions No 1 and No 3, what was the date of delivery of vacant possession of the plaintiff's land to the defendant?' The contents of the defendant's affidavits which they filed to object the plaintiff's application showed that the defendant understood that the above question was the question of construction raised by the plaintiff. Rule 1(3) says that the parties must be given 'an opportunity of being heard on the question'. At the hearing of the plaintiff's application, the defendant's counsel was given much time and opportunity to submit. In fact he asked to reply a second time and I granted him an extra time to submit again after the plaintiff's counsel replied to his first submission.

[10] The fifth point raised by the defendant was that the plaintiff's two affidavits affirmed by Dato' Tan Eng Boon and Tang Pei Hau respectively are hearsay evidence and must be disregarded. This submission was surprising because Tang Pei Hau had affirmed in his affidavit that he had personal knowledge of the facts stated in his affidavit. He deposed at paragraph 5: 'Oleh itu, pada 18 November 2005 saya telah mengunjungi tanah plaintif untuk memastikan bahawa segala perabut dan perkakas pengajaran Sekolah Rendah Jenis Kebangsaan Hwa Nan (kemudian dari ini dirujuk sebagai 'Sekolah Hwa Nan') yang terletak di hujung tanah plaintif ada dipindahkan keluar pada tarikh tersebut' (Emphasis added).

[11] At paragraph 6 of his said affidavit, Tang Pei Hau deposed: 'Saya memerhatikan dengan mata saya sendiri bahawa kerja pemindahan memang ada dijalankan pada 18 November 2005 dan saya telah mengambil gambar-gambar untuk merakamkan kenyataan ini….' The photographs that he took were exhibited in his said affidavit. He then deposed at para 7 that he followed the lorry transporting the furniture and equipment of Sekolah Hwa Nan to its new premises in Parit Imam on 18 November 2005. I believe it is clear that Tang Pei Hau had personal knowledge of the contents of his affidavit. He was the photographer of the photographs that was exhibited in his affidavit. His evidence is definitely admissible in court. As for Dato'

Tan Eng Boon's affidavit dated 11 September 2006, it contained facts within his personal knowledge. Unlike Tang Pei Hau, Dato' Tan was not there when the school was moved but he exhibited ('TEB-12') in his said affidavit a Statutory Declaration affirmed by a gentleman (Mr Lee Sea Boon) who organised the moving of the school. A statutory declaration is a declaration that the maker makes under oath to be true. If the maker makes a false statement in his statutory declaration, he is liable to be prosecuted for giving false evidence, much the same as if the deponent of an affidavit makes any false statement in his affidavit. Further, I note that in s 3 of the Interpretation Act 1967, 'affidavit' is defined to 'include statutory declaration'. Thus, Dato' Tan Eng Boon's affidavit is also definitely admissible in court.

[12] The sixth point raised by the defendant was that there were disputes of facts that can be resolved only by calling witnesses. In the O 14A case of *Petroleum Nasional Bhd v Kerajaan Negeri Terengganu* [2004] 1 MLJ 8, the Court of Appeal applied the principles set out in *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MLJ 400 which was about how the Court should approach conflicting affidavit evidence. The Supreme Court in the *Bank Negara case* had followed the approach of the Privy Council whereby Lord Diplock held:

> Although in the normal way it is not appropriate for a judge to attempt to resolve conflicts of evidence on affidavit, this does not mean that he is bound to accept uncritically, as raising a dispute of fact which calls for further investigation, every statement on an affidavit however equivocal, lacking in precision, inconsistent with undisputed contemporary documents or other statements by the same deponent, or inherently improbable in itself it may be.

[13] On the same point, it is noted that the Supreme Court in *Raja Zainal Abidin bin Raja Hj Tachik & Ors v British-American Life & General Insurance Bhd* [1993] 3 MLJ 16 followed the decision of the Privy Council in *Tractors Malaysia Bhd v Tio Chee Hing* [1975] 2 MLJ 1 which ruled that it is necessary to subject affidavit evidence to critical examination. In other words, statements and exhibits in affidavits that contradict undisputed contemporary documents or contradict other statements by the same deponent should be rejected instead of being held as issues requiring the calling of witnesses.

[14] I found the affidavits filed by the plaintiff to support the O 14A application to be very complete and thorough. Dato' Tan Eng Boon had exhibited in his affidavit dated 11 September 2006 a letter from the school's headmaster confirming that the school moved on 18 November 2005 to its new premises in Jalan Parit Imam and had started operation there since 1 January 2006. It was also confirmed in the school headmaster's letter that 'segala alatan sekolah telah dipindah ke sini dan semua kakitangan sekolah telah bermula berkhidmat di lokasi dan bangunan baru ini.' He also exhibited in his affidavit a newspaper article from Sin Chew Daily dated 27 December 2006 together with an English translation of the article. A few photographs of the new school and those present at the Opening Ceremony of the new school premises for Sekolah Hwa Nan were published in the article which reported, inter alia, that the Member of Parliament of Sri Gading Datuk Mohd Aziz announced a donation of RM30,000 for the school development funds. The photographs exhibited in the plaintiff's manager Tang Pei Hau's affidavit were

confirmed as those taken by him personally on 18 November 2005. Those photographs showed the process of moving of the school. Several photographs showed old empty classrooms, and school desks and chairs being loaded onto a lorry at the old premises. There were also photographs showing school desks and chairs being unloaded from a lorry at the new school premises. I believe it is very important to note that the defendant's representative Yiap Toon Cheng (who affirmed all the affidavits on behalf of the defendant in this case) wrote in his own handwriting on 21 November 2005 that the school administration had been relocated. If he had seen the students' desks, chairs and other school teaching equipment in the old premises while conducting the joint inspection, I am sure he would have asked the defendant's conveyancing solicitors to write to the plaintiff's conveyancing solicitors about it immediately in November 2005 and not to wait till 8 March 2006.

[15] I was initially surprised to find that Dato' Tan Eng Boon exhibited in his affidavit an affidavit dated 4 July 2006 which was affirmed by the defendant's manager Yiap Toon Cheng. It turned out to be an affidavit affirmed by Yiap to support the defendant's application in their originating summons filed regarding the same subject matter ('Yiap's OS Affidavit'). In Yiap's OS Affidavit, he had named three persons as being the 'school administration' who prevented the defendant from entering the school and who allegedly had a meeting with him on 17 February 2006 and 22 February 2006. A few letters were also exhibited in Dato' Tan's affidavit to show that two of those three persons denied preventing the defendant from entering the school. The third person named by Yiap Toon Cheng was one 'Tan Yu Keng'. However, Tan Yu Keng in his letter stated very clearly that he did not even meet Yiap Toon Cheng on 17 February 2006 or 22 February 2006. I have carefully read Yiap Toon Cheng's affidavit in reply dated 25 September 2006 to see if Yiap denies making false statements in Yiap's OS Affidavit. I note that his reply was that what was said for the Originating Summons was not relevant in this case! An affidavit contains statements made under oath, believed by the deponent to be true and accurate. A witness should not be giving different versions of facts under oath to suit his needs. He must not be allowed to brush off his false statement in another case concerning the same subject matter by saying it is not relevant.

[16] The defendant had relied on a letter dated 28 February 2006, written by the plaintiff to the defendant to handover a key to the school, to support their stand that vacant possession was handed over on 28 February 2006. However, the defendant did not deny the plaintiff's statement that there were four gates, located at four different parts of the fencing, around the school. It was explained by the plaintiff that the gate facing the main road (referred to as 'Pintu Pagar Keempat' in the plaintiff's affidavits) was too close to a busy road junction with traffic lights and was therefore kept locked at all times. According to the plaintiff, all the other three gates were open at the time of the joint inspection on 21 November 2005 and that the defendant made a request some time around 25 February 2006 for the key to that gate which could not be used. The plaintiff's manager said he managed to find the key to the Pintu Pagar Keempat, ie, the fourth gate on 28 February 2006 and handed it to the defendant together with a standard cover letter prepared by their clerk. A clear survey plan and photographs showing the positions of the four gates were exhibited in the plaintiff's affidavit. Upon studying them, I was convinced that there were at least three gates

surrounding the fencing of the old school premises of the School and there is a gate located at the traffic lights junction of the main road. This is not unusual as it is common for premises of old schools in Malaysia to have more than one entrance. What is more important is that those letters written by the defendant's conveyancing solicitors after the joint inspection on 21 November 2005 did not complain at all of not having keys to enter the old school premises. There is no doubt the defendant had access to the school since 21 November 2005. In any event, the school occupied only about 5% of the total land area of the plaintiff's land, and the defendant did not deny having taken possession of the other 95% of the plaintiff's land earlier.

[17] Looking at all the evidence submitted by both sides, I am sure that if the headmaster and the school teachers of the School are called as witnesses in court, they will all confirm that the School had moved to their new premises in November 2005, and the parents of the students will all confirm that they started attending classes at their new school premises in January 2006. I also have no doubt that if YB Datuk Mohd Aziz (the Member of Parliament of Sri Gading) is asked in court as a witness, he will also confirm that he attended the Opening Ceremony of the new school premises for Sekolah Hwa Nan. It will cause unnecessary delay and be a waste of time if they have to be called as witnesses to confirm what was already clear from contemporaneous documents and photographs. Most important is that the material facts (summarised into 14 paragraphs above) were not in dispute for the purpose of construing the question of construction of the Special Conditions in the said Agreement.

[18] The contents and application of O 14A in England is different from that used in Malaysia. Our Court of Appeal in the *Petronas case* (at p 28 para E) highlighted the difference between the contents and application of O 14A in England and in Malaysia. In England, both parties must consent to the use of O 14Abut under our O14A rule 3, the caveat placed upon the court is merely to give the parties the opportunity of being heard on the question.

[19] Learned Counsel for the plaintiff submitted that in the *Petronas case*, the Court of Appeal pointed out that the plaintiff was relying on six different causes of action against the first defendant (at p 14 para D), which included breach of contract, tort of inducement for breach of contract, estoppel, etc. He also pointed out that the first defendant there proposed as many as five questions of law for the Court to determine while the second defendant proposed three questions of law. A reading of the judgment of the Court of Appeal in the *Petronas case* shows that it was indeed a very complicated case and the plaintiff there raised numerous disputes of facts (at p 16). Further, it was true that there were six causes of action raised in the *Petronas case*. Yet the Court of Appeal held that affidavit evidence was sufficient and O 14A was appropriate (at p 25 para C to E and p 27 para G to I). In this case before me, there is only one cause of action based on the said Agreement and only one main issue. Learned Counsel for the defendant did not dispute that in this case the main question that the Court need to decide was the question of date of delivery of vacant possession of the plaintiff's land to the defendant. After considering all the affidavits,

I was satisfied that this could be done by considering the true construction of Special Conditions 1 and 3 of the said Agreement, which is binding on both the plaintiff and the defendant.

[20] I am therefore of the view that this is a suitable case for determination of the question of construction of the said Agreement by using O 14A. There were Special Conditions in the said Agreement and according to Clause 23,the Special Conditions shall prevail over the terms and conditions contained in Clause 1 to 22.

[21] Special Conditions No 1 and No 3 read as follows:

> 1. The parties hereto are aware that currently there are forty (40) squatters and a Chinese school on the said property. The Vendor shall be given six (6) months from the date of the Sale & Purchase Agreement to clear the said squatters and nine (9) months to relocate the said School in order to hand over vacant possession of the said Property to the Purchaser. Within six (6) months from the date of this Agreement, the Vendor shall evict the forty (40) squatters and upon confirmation by the Purchaser of the aforesaid, the Purchaser shall pay to the Vendor a further sum equivalent to 2.5% of the Purchase Price. If the Vendor is unable to evict the said squatters within the said 6 months period, the Vendor shall not be entitled to the said sum early and the balance purchase price shall therefore be payable within the time stated in Section 10 of the Schedule hereto. The parties hereby expressly agree that the Vendor shall be given an automatic extension of three (3) months from the expiry of the time stipulated hereinabove (hereinafter referred to as 'the Automatic Extension Period') to clear the squatters and relocate the school in the event the Vendor fails to complete the abovesaid within the time stipulated hereinabove. Thereafter, the purchaser shall have the option to extend the completion date in the event the Vendor fails to evict the squatters and relocate the school after the Automatic Extension Period.
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> 3. From the date that the Vendor confirms in writing that vacant possession is ready to be delivered to the Purchaser pursuant to Clause 1 above and upon inspection and confirmation by the Purchaser, the Purchaser shall be given four (4) months from the date thereof to settle the balance of the Purchase Price to the Vendor, with an automatic extension of two (2) months commencing from the expiry of the aforesaid four (4) months provided that the Purchaser shall pay interest on the balance of the Purchase Price still unpaid at the rate of seven percentum (7%) per annum calculated from the commencement of the extended period until the full settlement of the balance Purchase Price. (Emphasis added)

[22] What did the plaintiff/vendor need to do under Special Conditions No 1 and No 3 of the said Agreement to deliver vacant possession to the defendant/purchaser? I have noted that the material words in Special Condition No 1 were: '... to relocate the School in order to hand over vacant possession of the said property to the purchaser.' A school is 'relocated' when it has been moved to a different place. Special Condition No 1 must be construed to mean that the plaintiff/vendor and the defendant/purchaser agreed that vacant possession was ready to be delivered by the plaintiff/vendor when the 40 squatters have been evicted and the school occupying a small part of the land has been moved to its new premises. The material words in Special Condition No 3 were: 'From the date that the vendor confirms in writing that vacant possession is ready to be delivered to the purchaser pursuant to cl 1 above and upon inspection and confirmation by the purchaser...' (Emphasis added). From this Special Condition No 3 it must be construed to mean that there must be a joint

inspection of the land for the process of delivery of vacant possession to happen, and a confirmation in writing by the defendant/purchaser's representative after the joint inspection for the process of delivery of vacant possession to be considered as concluded.

[23] As stated above, based on the undisputed material facts the question was: upon construing the said Agreement, in particular Special Conditions No 1 and No 3, what was the date of delivery of vacant possession of the plaintiff's land to the defendant? I found that the answer is this: The date of delivery of vacant possession was the date when a joint inspection was carried out and the defendant/purchaser's representative confirmed that the school had been relocated.

[24] The defendant/purchaser did not deny that all 40 squatters were evicted earlier. I found the facts showed that the School had been relocated before the date of joint inspection, which took place on 21 November 2005. After the joint inspection was carried out as required under Special Condition No 3, the defendant/purchaser's representative confirmed having jointly inspected the site and also that the school administration had been 'relocated' using the same word that was used in Special Condition No 1. The conclusion must be that delivery of vacant possession happened on 21 November 2005.

[25] Though both Counsel did not submit on this point, I also noted from Special Condition No 2 that if the Plaintiff had failed to deliver vacant possession to the Defendant, the Defendant could have terminated the said Agreement and asked the Plaintiff for a refund of the deposit. This was something that the Defendant/Purchaser could have done after the 12 months period (nine months plus three months automatic extension as mentioned in Special Condition No 1) ended on 19 November 2005. However, the defendant obviously did not choose to do so because they had, on 17 November 2005 through their solicitors Messrs Ajmer Sandhu & Ong, fixed a later date of 21 November 2005 and time of 2.30 pm for a joint inspection of the plaintiff's land, obviously for the purpose of taking delivery of vacant possession. These undisputed facts reaffirmed my finding that delivery of vacant possession of the plaintiff's land was concluded according to the said Agreement on 21 November 2005.

[26] The consequential prayers in the plaintiff's application are justified because the four months period for the defendant to pay up the balance ninety percent of the purchase price expired on 21 March 2006. The agreed extension of time for payment was two months, subject to payment of interest at seven percent per annum, and this two months period expired on 21 May 2006. Since the defendant admitted that no payment was made on or before 21 May 2006, clause 12 that provides for forfeiture of the ten percent deposit is applicable. The defendant should have returned vacant possession of the plaintiff's land by 22 May 2006. They failed to do so and instead have wrongfully continued to make use of the plaintiff's land. The defendant must therefore pay the plaintiff damages for the loss and damage suffered by the plaintiff. The quantum of damages will be assessed later.

A [27] From the affidavits of both sides, it appeared that the defendant made a payment of RM5.15m to the plaintiff's conveyancing solicitor on 24 August 2006. I agree with the submission of the plaintiff's counsel that this payment was more than three months late because the last day for payment was 21 May 2006. In any event, this payment of RM5.15m was still more than RM25m short of the balance purchase price of RM30.15m plus late payment interest. Clause 4(d) of the said Agreement set out the mandatory conditions which must be complied with by the defendant/purchaser before they can ask the plaintiff/vendor to handover the original Issue Document of Title for the plaintiff's land. One of the conditions was that either the bank providing the loan to the defendant/purchaser or the Purchaser's solicitors must give an undertaking to the plaintiff/vendor to forward the loan money. I noted from the letter dated 22 August 2006 written by the defendant's conveyancing solicitors Messrs Ajmer Sandhu & Ong that they asked for the original title and all related documents to effect the transfer of the plaintiff's land to be forwarded to them, but they did not give any undertaking to pay the balance purchase price to the plaintiff/vendor. They also did not mention anything about the late payment interest. I also noted that as at 21 August 2006, the defendant only managed to obtain a conditional approval for a loan. There was no letter of offer to comply with the conditions in cl 4(d) of the said Agreement. In any event, as explained above, they were already three months late in August 2006 and the plaintiff was entitled to forfeit the deposit pursuant to cl 12. The late payment of RM5.15m should be refunded by the plaintiff after the defendant has restored the plaintiff's land and returned vacant possession to the plaintiff. Meanwhile, it is fair for the plaintiff to withhold the money as security for damages. It follows that the plaintiff is entitled to all the consequential prayers 2(a) to (g) of their O 14A application in encl 8. I therefore granted Order in terms of prayers 2(a) to (g) of Encl 8.

F *Order 14A application allowed.*

Reported by Eugene Daniel Louis

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